DCCUMENT RESUME

03625 - [A2653818]

[Protest Alleging Unduly Restrictive Specifications]. B-188920; B-188921. September 19, 1977. 5 pp.

Decision re: Transtector Systems; Joslyn Mfg. & Supply Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Crganizatica Concerned: Federal Aviation Administration.
Authority: B-188342 (1977). 4 C.P.R. 20.2(b)(1).

Two companies protested specifications, Transtector arguing that solicitations were internally conflicting and Joslyn objecting to a portion of specifications said to be unduly restrictive. The solicitation was not found to be internally inconsistent; GAO does not consider objections involving agency determination cf Government's needs. The protest to matters apparent on the face of the solicitation was untimely. (HTW)

3818

03625

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B Jorgenson

FILE: B-188920, B-188921 DATE: September 19, 1977

MATTER OF: Transtector Systems and Joslyn Mfg. & Supply Co.

DIGEST:

1. Language stating general system objectives is limited by specific performance criteria, and consequently, IFB was not internally inconsistent or ambiguous.

2. GAO will not consider as bid protest objection concerning agency determination that less restrictive specification will meet Government's needs.

3. Protest filed after bid opening but going to matters apparent on the face of the solicitation is untimely.

Transtector Systems Division of Konic International Corporation (Transtector) protests the specifications utilized by the Federal Aviation Administration (FAA) in solicitations LGM7-7509B1 (our file B-188920) and LGM7-7465B1 (our file B-188921), for power arresters. Joslyn Manufacturing and Supply Company also has protested the specifications used in LGM7-7465B1, contending that they are overly restrictive, or in any event apply different standards which discriminate against its equipment.

Power arresters are designed to suppress electrical transient currents caused by lightning, induction or switching surges. This equipment provides protection against sudden voltage surges, serving as a barrier between power transmission lines and sensitive electronic equipment served. As Transtector emphasizes, the equipment to be protected is used in controlling, and as aids to, air navigation.

In B-188920 the statement of work required the arrester to be designed as a surge suppressing device, with a "response * * * such that damage to solid state electronic equipment * * * and its related switchgear due to surges * * * is prevented." Further, the IFB

provided that the arrester was required to meet a number of more specific requirements, including standards defining voltage rating and clamp response time (time in nanoseconds required to clamp incoming transients after turn-on voltage is reached at 1 milliampere current). The parameters described specific discharge voltage (for a stated waveform, current and life) and turn-on voltage (780 volts at 1 milliampere), as well as maximum voltage levels permitted across protected equipment (2000 volts).

The solicitation in B-188921 sought bids for four designated systems, identified by Joslyn Electronics Systems and Transtector Systems model numbers, or equal. Article V of the IFB, styled "Salient Characteristics," included a general introductory statement describing power arresters, and the statement, "The response shall be such that damage to solid-state electronic equipment is prevented." It stated further:

> "The arrester may be of the spark gap, solid state, or zinc oxide nonlinear resister * * * type. Regardless of the type furnished, the salient characteristics of the arresters shall be as shown on Table 1 * * *."

Table 1 lists the required voltage rating, breakdown voltage, impulse sparkover voltage, discharge voltage, and surge life, among other characteristics.

Transtector argues that provisions in the solicitations are internally conflicting in that they require that the arresters be designed to prevent damage to the equipment protected while the performance criteria specified will not provide such protection. Alternatively, Transtector asserts that the performance criteria are inadequate to meet the Government's actual needs, noting that integrated circuits can be damaged if exposed to surges well below the several thousand volts allowed, and that the manufacturers of the equipment served did not anticipate such levels. Transtector believes FAA has discriminated against its produc by permitting the furnishing of competing gas tube devices. Transtector attributes this to the use of specifications which it says were

developed by a technically unqualified firm. It believes that the requirements as stated in these solicitations were "not the result of a well disciplined technically directed study to define the most effective device to protect solid-state electronic equipment from transient voltage damage."

Acknowledging that Transtector's equipment affords better protection than do other devices, over certain ranges, the FAA indicates that in its view competing equipment has advantages in other respects. It does not believe that the general language cited by Transtector indicates an ambiguity in or inconsistency with the more definitive performance criteria provided in the specifications. Moreover, it states that it has attempted to define performance criteria which accurately reflect its minimum needs. In this regard, the FAA notes that the specifications were drafted to define required performance levels, insofar as possible without reference to the type of device offered, because "that is what is to be demonstrated regardless of how the device operates." It denies that its criteria are meant to guarantee that any specific type of device will be selected. It points out that the low responsive bidder in B-188921 (Lightning Protection Corporation) did not propose a gas tube device.

In that connection, Joslyn objects to that portion of the specifications in B-188921 which establishes different 10-20 microsecond wave form characteristics to be assumed depending upon the character of the device, i.e. whether a spark gap, ZNR, or solid state unit is proposed. Joslyn asserts that the IFB is unduly restrictive because it requires its devices to by-pass higher energy levels than the equipment of its competitors. In this connection it points out that the amount of energy in a lightning strike bears no relation to the type of protective device which will be encountered.

Regarding Transtector's view that the specifications are ambiguous, under the usual contract rule of construction, specific language is to be given controlling importance over language enunciating only a general requirement. Although language used in a solicitation should be drafted to be easily understood by bidders, and should not compel bidders to resort to complex rules of legal construction,

we believe that the specifications used in these cases are not ambiguous. In context, the language relied upon by Transtector stated only a general system objective (i.e., that arresters are meant to be protective devices), and that the devices offered were required to meet the specific performance criteria stated. No device will provide total protection. The performance criteria must be taken as describing the level of protection required.

Transtector's more basic objective is to have the Government include more specific criteria than the FAA found necessary. Our Office, however, will not consider such objections, absent evidence of fraud or intentional misconduct. Miltope Corporation, B-188342, June 9, 1977, 77-1 CPD 417, aff'd. B-188342, July 1, 1977, 77-2 CPD 3.

Although we certainly concur with Transtector's expression of concern for the promotion of air safety, it is not the function of this Office to devise specifications. We do not substitute our judgment for that of agency personnel, in matters falling within the sound exercise of their executive discretion. FAA has primary responsibility for determining its requirements. It may make judgments in procuring equipment with which others may disagree, or which time may ultimately show were unsound.

Our concern is to assure that procurement decisions are made consistent with applicable law. Ordinarily, the protester bears the burden of establishing the facts to support his complaint. We do not find that these solicitations in some way were meant to discriminate against Transtector in a competitively unequal basis. The FAA denies that any discrimination is intended, it has purchased Transtector products in the past, those products were identified as an acceptable brand name in B-188921, and they were permitted to be offered under both solicitations. Transtector's assertion that the FAA improperly relied upon a defective technical study--here supported only by Transtector's expressed belief that the study was incompetently conducted--is of itself insufficient

to demonstrate fraud or intentional misconduct. There is no evidence that the FAA's determination was not, as the FAA says it was, a result of the FAA's independent assessment of its needs.

Finally, Joslyn filed its protest long after bid opening. Since the protest questions the propriety of certain provisions in the IFB in B-188921, involving a matter which should have been apparent on the face of the IFB before bid opening, it was not timely filed as required by section 20.2(b)(1) of our bid protest procedures. 4 C.F.R. § 20.2(b)(1) (1977). The question raised does not involve a matter significant to procurement practice and procedures, inasmuch as the principles of law involved in such complaints are well settled. The matter, therefore, does not appear appropriate for consideration under the exception stated at 4 C.F.R. § 20.2(c).

Accordingly, the protests filed by Transtector are denied. The protest filed by Joslyn is dismissed.

R.F. Keller

Deputy Comptroller General
of the United States